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IN THE COURT OF APPEALS OF INDIANA

CALVIN TILLMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0601-CR-43
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0503-FC-35892

February 19, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Calvin Tillman ("Tillman") was convicted of Class C felony child molesting[1] by a jury in Marion Superior Court. He appeals, raising two issues:

> I. Whether the trial court abused its discretion when it admitted the victim's out-of-court statements to her mother and a neighbor; and,
>
> II. Whether sufficient evidence supports his conviction.

We affirm.

Facts and Procedural History

On the morning of February 28, 2005, Shaquonda Moore ("Moore") left her two children, three-year-old S.M. and infant J.G., in the care of Tillman, who lived with her best friend Emma Washington ("Washington"). Moore and Washington each lived in half of the same duplex. While the two women ran errands, Tillman babysat S.M. and J.G., as well as Washington's two small children, one of whom was his grandson.

When Moore returned from her errands, she, S.M., and J.G. returned to their side of the duplex. A short time later, as Moore was changing J.G.'s diaper, S.M. told her, "Pops put his tail on me."[2] Tr. p. 32. Thinking that S.M. was referring to a game, Moore asked S.M. "what tail?" Id. S.M. replied, "he put his tail on me." Id. When Moore then asked S.M. where his tail was, S.M. answered "in his drawers." Tr. pp. 32-33. Moore asked S.M. if Pops put his tail on Washington's son. S.M. said, "No, he has his own tail." Tr. p. 33. Moore then asked if S.M.'s brother had a tail. S.M. answered that he did and it was "in his diaper." Id.

[1] Ind. Code § 35-42-4-3(b) (2004).
[2] "Pops" is Tillman's nickname. Tr. p. 32.

Moore asked S.M. where Tillman had put his tail, and S.M. pointed to her vaginal area. Tr. p. 34. She told her mother that "we was in Cutty's room." [3] Tr. p. 34. Moore called Washington, who came over a few minutes later. Moore asked S.M. to tell Washington what she had told her. S.M. repeated that "Pops touched me with his tail." Tr. p. 60. Washington asked S.M. what she meant by "tail," and S.M. pointed to Washington's son's private area and said "[h]e's got a tail just like him." Id. S.M. told Washington that "[h]e rubbed me with his tail." Tr. p. 61.

Washington went back to her side of the duplex and returned a short time later with Tillman. Tillman asked S.M., "Why did you tell your momma I put my tail on you?" to which S.M. replied, "You did put your tail on me." Tr. p. 37. Tillman told her, "That's bad business. Don't be telling nobody that." Id. He then left.

Moore called her mother, who advised her to call the police. The responding officers took Moore and S.M. to the Child Advocacy Center that afternoon where they were both interviewed. Later that day, Moore took S.M. to Riley Children's Hospital, where she was examined by a pediatric sexual assault nurse. S.M.'s examination revealed an abrasion and tear of her hymen. Tr. p. 90. A vaginal cervical swab taken revealed the presence of sperm. Tr. p. 168; Ex. Vol. State's Ex. 47. Because of the small amount of sperm present on the swab, complete DNA analysis was not possible. Tr. p. 221.

The State initially charged Tillman with Class C felony child molesting, and later added a count of Class A felony child molesting. On August 12, 2005, the trial court held a hearing on whether S.M. could testify at trial. The court determined that S.M. was not

[3] "Cutty" is Washington's nickname. Tr. p. 34.

competent to testify because she was unable to appreciate the nature and obligation of an oath. Applying the Protected Person Statute[4] and the rules of evidence, the court ruled that although S.M. could not testify, her statements to her mother and Washington were sufficiently reliable to be admitted at trial. A jury convicted Tillman of Class C felony child molesting, and the court sentenced him to four years. Tillman now appeals.

I. Admission of Victim's Statements

First, Tillman argues that the trial court abused its discretion when it admitted out-of-court statements S.M. made to her mother and neighbor.

"[T]he decision to admit or exclude evidence is within a trial court's sound discretion and is afforded great deference on appeal." Carpenter v. State, 786 N.E.2d 696, 702 (Ind. 2003). An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or it misinterprets the law. Id. at 703.

Tillman contends that the trial court improperly admitted S.M.'s statements as "excited utterances" under Evidence Rule 803(2). Assuming for the sake of argument that S.M.'s statements were not properly admissible as "excited utterances," her statements were nonetheless admissible under the Protected Person Statute.

Indiana Code section 35-37-4-6 provides, in relevant part, that an otherwise inadmissible statement or videotape made by a protected person (a child under fourteen years of age or a mentally disabled individual) is admissible in criminal actions involving sex crimes defined in Indiana Code chapter 35-42-4 if the following conditions are met:

[4] Ind. Code § 35-37-4-6 (2004 & Supp. 2006).

> (1) the court must find, in a hearing attended by the protected person and outside the presence of the jury, that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability;
> (2) the protected person must either testify at the trial or be found unavailable as a witness;
> (3) if the protected person is found to be unavailable as a witness, the protected person must be available for cross-examination at the hearing or when the statement or videotape is made; and
> (4) the defendant must be notified at least ten days before trial of the prosecuting attorney's intention to introduce the statement or videotape and of the contents of the statement or videotape.

Ind. Code § 35-37-4-6(a)-(g).

"'Considerations in making the reliability determination under [Indiana Code section 35-37-4-6] include the time and circumstances of the statement, whether there was significant opportunity for coaching, the nature of the questioning, whether there was a motive to fabricate, use of age appropriate terminology, and spontaneity and repetition.'" M.T. v. State, 787 N.E.2d 509, 512 (Ind. Ct. App. 2003) (quoting Pierce v. State, 677 N.E.2d 39, 44 (Ind. 1997) (citing Idaho v. Wright, 497 U.S. 805, 821-22, (1990)) (alteration in original)).

After holding a hearing, the trial court determined that S.M. was not competent to testify at trial. However, the court also determined that S.M.'s statements were sufficiently reliable to be admitted at trial. Specifically, the court found that the

> disclosure to [Moore] was made within 5 to 10 minutes of leaving Defendant's house. No one knew the disclosure would be made. There was no opportunity to coach [S.M.]. [S.M.] used age-appropriate language in making her disclosure. The disclosure appears to have been made very near in time to the alleged events. The statements to [Washington] were made immediately after the initial disclosure in mother's presence and were an attempt to find out what had happened. And certainly the response to Defendant's question "Why did you tell your mama that stuff", (she stated "Cause you did put your tail right here") was certainly spontaneous and also immediately after the initial disclosure.

Appellent's App. p. 91. The court then concluded that S.M.'s statements were admissible under Evidence Rule 803(2) as excited utterances and under the Protected Person Statute.[5] The trial court did not abuse its discretion when it admitted S.M.'s statements.

Tillman also argues that the admission of S.M.'s hearsay statements violates the holding of Crawford v. Washington, 541 U.S. 36 (2004). Crawford held that out-of-court testimonial statements of unavailable witnesses may not be admitted at a criminal trial unless the adverse party has had an opportunity to cross-examine the unavailable witnesses. Id. at 68-69. However, S.M.'s statements to her mother and neighbor are not testimonial. See Purvis v. State, 829 N.E.2d 572, 579 (Ind. Ct. App. 2005), trans. denied. Therefore, Crawford is inapplicable and Tillman's argument fails.

II. Sufficiency of the Evidence

Next, Tillman argues that the State presented insufficient evidence to convict him of Class C felony child molesting. Our standard of review for claims challenging the sufficiency of the evidence is well settled. We will not reweigh the evidence or judge the credibility of the witnesses, and we will respect the jury's exclusive province to weigh conflicting evidence. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). Considering only the evidence and the reasonable inferences supporting the verdict, our task is to decide whether there is substantial evidence of probative value from which a reasonable jury could find the defendant guilty beyond a reasonable doubt. Id.

[5] Indiana Code section 35-37-4-6 applies to " [a] statement of videotape that:

> (1) is made by a person who at the time of trial is a protected person;
> (2) concerns an act that is a material element of an offense listed in subsection (a) or (b) that was allegedly committed against the person; and
> (3) is not otherwise admissible in evidence[.]

Ind. Code § 35-37-4-6(d). To the extent that the trial court's finding that S.M.'s statements were admissible under Rule 803(2) renders the Protected Person Statute inapplicable, we find any such error to be harmless.

In order to convict Tillman of Class C felony child molesting, the State was required to prove that he performed or submitted to touching or fondling with S.M., a child under fourteen, with the intent to arouse or satisfy the sexual desires of Tillman. Ind. Code § 35-42-4-3.

Moore testified that S.M. told her that Tillman "put his tail on me." Tr. p. 32. Moore testified that S.M. said that Washington's son had "his own tail," and that her brother had a tail "in his diaper." Tr. p. 33. Moore also testified that when she asked S.M. where Tillman had put his tail, and S.M. pointed to her vaginal area. Tr. p. 34. Washington testified that S.M. stated that Tillman "rubbed me with his tail." Tr. p. 61. She also testified that S.M. said that Tillman laid her on Washington's bed, pulled down her pants, and also pulled down his own pants. Tr. p. 61. In addition, the doctor evaluating the results of S.M.'s exam at Riley Hospital testified that S.M. had "suffered a penetrating trauma, meaning something has caused her an injury by passing between the labia." Tr. p. 119. The evidence is sufficient to support the jury's verdict.

Conclusion

The trial court did not abuse its discretion when it admitted S.M.'s statements under the Protected Person Statute. Sufficient evidences supports Tillman's conviction of Class C felony child molesting.

Affirmed.

KIRSCH, C. J., and SHARPNACK, J., concur.